# Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 30.

MERCHANTS NATIONAL BANK OF BOSTON,
EXECUTOR,
*Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR PETITIONER.

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## BRIEF FOR THE PETITIONER.

### Opinions Below.

The findings and opinion of the Board of Tax Appeals are reported in *Estate of Ozro Miller Field*, 45 B.T.A. 270, and printed in the Record, pp. 26-31. The opinion of the Circuit Court of Appeals is reported in *Commissioner* v. *Merchants National Bank of Boston, Executor*, 132 Fed. (2d) 483, and is printed in the Record, pp. 63-69.

### Jurisdiction.

The decree of the Circuit Court of Appeals was entered December 30, 1942 (R. 69).

The petition for certiorari was filed on March 29, 1943, and was granted May 3, 1943.

This Court has jurisdiction to review said decree under U.S. Code, Title 28, sec. 347.

## Questions Presented.

1. Is the value of a remainder bequeathed to charity deductible from the gross estate in determining federal estate tax where the trustee has discretionary power to invade principal for the comfort, support, maintenance and/or happiness of the decedent's widow, and the age and circumstances of the widow and the amount of the resources available for her make any invasion a mere possibility?

2. Are capital gains accruing to the residue in 1937 deductible in determining the federal income tax of the estate for that year?

## Statutes Involved.

Revenue Act of 1926, section 303:

"For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

. . . . . .

(3) The amount of all bequests, legacies, devises or transfers to or for the use of the United States, any state, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, . . ."

Revenue Act of 1936, section 162—NET INCOME:

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, . . ."

Section 23—DEDUCTIONS FROM GROSS INCOME:

"In computing net income there shall be allowed as deductions:

. . . . . .

(o) Charitable and Other Contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

. . . . . .

(2) a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . ."

. . . . . .

## Statement of the Case.

The decedent, Ozro Miller Field, was a resident of Massachusetts who made a modest fortune in the Kennedy clothing business in which he had made his start with Mr.

Kennedy in Beverly, Massachusetts. He appreciated that much of his fortune had been made from the public, and he and his wife, May, agreed that the money should go back to the public as much as possible. They made their wills simultaneously, leaving the remainder interests in their residuary estates to charities in which they were interested, including in Mr. Field's case the Beverly Hospital, which had been built up by Dr. Johnson, the family physician (R. 28, 45).

The decedent and his wife had lived prior to his death in an apartment in Beverly and in Mrs. Field's country home in Buckland, Massachusetts, which Mr. Field had given to her (R. 27, 42). They had no children. Mr. Field had been married before. He had no children by his first marriage, but he had adopted three children—two girls and a boy. These children have not been adopted by Mrs. Field. At the time of Mr. Field's death the two girls, Deborah, twenty-seven, and Elizabeth, twenty-seven, were married to husbands capable of supporting them, and the boy, Robert, was almost twenty-one (R. 27, 42). Besides these children Mrs. Field had relatives—her niece, Deborah L. Russell, whose husband was living at the time, and her niece's children, one a boy in medical school in New York, who has since obtained a position as an interne at Bellevue Hospital, and the other a girl, Elizabeth, who in turn was married and had two little girls (R. 44). It was costing Mr. and Mrs. Field about $6000 a year to live (R. 28, 42) and Mrs. Field testified that the mode of life in which she was living was very comfortable and satisfactory to her (R. 43).

Mr. Field from time to time had given Mrs. Field money and securities, and she also had money of her own and securities she had purchased herself (R. 27, 43). The value of this property, which was all liquid and substantially all invested in income-producing securities, was $106,916.79 (R. 27; Ex. 2, R. 39, 49), subject to the payment of a Massachusetts inheritance tax of $2518.46 (R. 28) upon $52,718.75,

of such property, which was owned jointly by herself and Mr. Field (R. 27). In addition she owned the country estate in Buckland.

Mr. Field died on May 3, 1936 (R. 27).

The gross estate of the decedent, as determined by the Commissioner, amounted to $366,527.66 (R. 24) and the prospective net estate after all deductions and taxes was $273,820.02. This, together with the $104,398.33 net of Mrs. Field's own cash and investments, made the total prospective resources in cash and income-producing securities available to her amount to $378,218.35. These resources are recapitulated as follows:

| | | | |
|---|---|---|---|
| Gross estate as valued by Commissioner (deficiency letter, R. 24) | | | $366,527.66 |
| Less jointly held property | | | 52,718.75 |
| Gross estate of decedent | | | $313,808.91 |
| Less: | | | |
| Deductions per deficiency letter | $117,967.86 | | |
| Restore exemption, 1926 Act | 100,000.00 | $17,967.86 | |
| Federal estate tax shown on return (deficiency letter) | | 17,176.71 | |
| Massachusetts inheritance taxes (deficiency letter) | | 4,844.32 | 39,988.89 |
| Prospective net estate | | | $273,820.02[1] |
| Personal estate of Mrs. Field, including jointly owned property | | $106,916.79 | |
| Deduct Massachusetts tax on jointly owned property | | 2,518.46 | 104,398.33 |
| Total prospective resources | | | $378,218.35 |

[1] The only legacy ahead of the residue was a bequest of all tangible personal property to Mrs. Field (Exhibit 4, R. 41, 53).

In 1937 securities of the estate, including 2,000 shares of the preferred stock of the Kennedy Company, were sold, resulting in a net capital gain of $100,900.31 (Deficiency Letter, Income Tax case, R. 14; (R. 29), The total resources available to Mrs. Field had increased by about $100,000 by January 1, 1938 (Ex. 2, R. 39, 49).

At the time of her husband's death Mrs. Field was sixty-seven years old (R. 27, 41). Since her husband's death she has lived comfortably at her home in Buckland and in first-class residential hotels (R. 43). Her personal expenses have been between $6000 and $7000 a year (R. 28, 43), not including taxes or non-recurring expenditures. Such expenditures, including a fur coat costing $2250, trips to Nassau and Bermuda costing $800 apiece, and taking care of those having natural claims upon her (R. 28, 29, 44, 45), amounted on the average to about $5000 a year (Ex. 3; R. 39, 51). She has been able to do whatever she wanted to do for her relatives within the amount she has spent (R. 29, 45). She has never asked for any of the principal of her husband's estate and does not intend to ask for any of it (R. 28, 46). The following table shows the amounts of income available and the total expenditures of Mrs. Field by periods (R. 28; Exs. 1, 3; R. 38, 39, 47, 51):

| Period | Income | Expenditures |
|---|---|---|
| 1936 (7 months) | $10,735.35 | $ 1,858.99 |
| 1937 | 24,738.57 | 10,357.91 |
| 1938 | 17,480.85[2] | 11,055.91 |
| 1939 | 17,448.23 | 12,024.92 |
| 1940 | 16,959.66 | 13,389.31 |
| Total | $87,362.66 | $48,682.04 |

[2] The difference between the 1937 income and the income in succeeding years is explained by the fact that federal and Massachusetts estate and inheritance taxes were paid in 1937, and that the shares of 7 per cent preferred stock of the Kennedy Company

Of the income available to her she has saved about $44,000 (R. 28, 46). The estate has been holding about $41,000 uninvested (R. 28). By December 31, 1940, the total resources had increased to over half a million dollars (Ex. 2; R. 49).

Article Third of the will leaves the residue of the estate (the only prior legacy being a bequest of tangible personal property to Mrs. Field) to The Merchants National Bank of Boston in trust to pay the net income quarter-annually or oftener in the discretion of the trustee to the decedent's wife, May L. Field, during the term of her natural life. The article then contains the following paragraph:

> "My said Trustee shall also have the right to pay to, or for the benefit of my said wife, May L. Field, such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust" (Ex. 4; R. 41, 53, 54).

Upon Mrs. Field's death the trust fund, except for $100,000, is to go to charitable beneficiaries. The trustee is to retain such $100,000 and to pay the income thereof one-quarter to each of the testator's three adopted children for life and one-quarter to Mrs. Field's niece for life. One-quarter of this $100,000 fund is to go, as each beneficiary dies, to the charitable beneficiaries (Ex. 4; R. 41, 53-59).

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were sold in February of that year, after there had been paid upon it $6 per share on account of dividends in arrears (Ex. 1, note (*d*), R. 38, 47).

The charitable beneficiaries are corporations of such character as to render gifts to them deductible under both the estate and income tax laws (R. 28). The value of the prospective life interests of the four beneficiaries of the $100,000 fund has been computed and the tax thereon is provided for in the decision of the Board of Tax Appeals (R. 31, 32).

The executor in the estate tax return claimed a deduction of $128,276.94, representing the value of the remainder interest in the residue, and in its income tax return for 1937 claimed a deduction of $100,900.31, representing the capital gains (Deficiency Letters, R. 23, 13).

The Commissioner of Internal Revenue disallowed these deductions and determined resulting deficiencies in estate tax and income tax. Proceedings were brought in the Board of Tax Appeals to contest such determinations. The proceedings were consolidated. The Board of Tax Appeals allowed the deductions (R. 31). The Circuit Court of Appeals for the First Circuit reversed the decision of the Board (R. 69).

**Specification of Errors.**

1. The court erred in not following the decision of this court in *Ithaca Trust Company* v. *United States*, 279 U.S. 151.

2. The court erred in announcing a construction of the charitable deduction provisions of the estate and income tax laws at variance with the construction in favor of the charities which has been adopted in the Second, Fifth, Eighth, Ninth and Tenth Circuits in conformity with the *Ithaca Trust Company* case.

3. The court erred in holding that the case was governed by *Gammons* v. *Hassett*, 121 Fed. (2d) 229, certiorari denied, 314 U.S. 673, which case is plainly distinguishable.

4. The court erred in disregarding the conclusions of the Board (which were justified by the evidence) that the standard of maintenance fixed by Mr. Field was capable of being stated in fairly definite terms of money; that the income at the death of the testator was more than sufficient to maintain the widow as required, and there was no uncertainty as to future sufficiency appreciably greater than the general uncertainty that attends human affairs (R. 30); and that the possibility of invasion was sufficiently remote to justify the deductions claimed (R. 31).

## Summary of Argument.

The provisions of the federal estate and income tax laws exempting gifts to charity express an important public policy. As this court has pointed out, this policy is to be given effect, if possible, and not frustrated.

The case is governed by the decision of this court in the case of *Ithaca Trust Company* v. *United States*, 279 U.S. 151, which involved a trust of the same type. Both are cases of trusts for a widow for life with remainders to charity. In both cases the trustee was empowered to invade corpus for the protection of the wife so that it was *possible* that invasion might occur. But in neither case was the widow given any control of the corpus or any discretion; in each case the widow was advanced in age, had enjoyed a comfortable and established mode of life; and in each case the trust was substantial and produced income substantially in excess of the widow's requirements, so that the *probability* that any invasion of the remainder would occur was merely an academic one, too remote for expression by any probability factor. In short, in both cases the discretion was written into the will to protect the widow in case of catastrophe rather than against any foreseeable possibility. It was held in the *Ithaca Trust Company* case

that the possibility of invasion was tolerable and that the remainder to charity was deductible. As stated by Mr. Justice Holmes, the uncertainty that the charity would take "was not appreciably greater than the general uncertainty that attends human affairs."

The Board of Tax Appeals, upon the evidence in this case, was amply justified in finding such resemblance to the *Ithaca Trust Company* case as to warrant following it as a precedent, and applying the rule therein announced. There is nothing in this case to prevent, as a matter of law, such application.

The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals. It did not reverse that decision because of any asserted error committed by the Board in evaluating the possibility of invasion of the corpus, but because it felt constrained to follow its decision in the *Gammons* case. The decision in the *Gammons* case was right, but it was an entirely different kind of case. Probably the court was influenced by some observations upon the *Ithaca Trust Company* case which appeared in the opinions in the *Gammons* case (and which were wholly unnecessary to the decision in that case); possibly the true grounds for distinguishing the *Gammons* case, namely, that in that case the beneficiary had as unfettered a power to dispose of the principal as if she had been its absolute owner, was not brought to the attention of the court. The argument of the court below that the deduction could not be allowed because there was a possibility that the trust might be invaded is the same argument which was advanced by the government and adopted by the Court of Claims in the *Ithaca Trust Company* case, but rejected by this court.

Other Circuit Courts of Appeals have followed the *Ithaca Trust Company* case in cases of trusts for charity with limited powers of invasion such as ours. The decision below is in conflict with all of these decisions.

The questions of whether, in the case of any such trust, the powers given create tangible uncertainty that the charity will take and whether the deductions can properly be allowed without intolerable possibility of impairment of the revenue which the statutes are designed to raise, are essentially factual. If the deductions can be so allowed, they ought to be in order to effectuate the provisions of the statute. Under the rule in the *Ithaca Trust Company* case these questions can be decided by the tribunal which hears the evidence and sees the witnesses. The lower tribunals are of course subject to control by appellate tribunals if they arrive at conclusions not warranted by the evidence or seek to apply the rule in cases to which it is not appropriate. The experience has been that the lower courts and the Board of Tax Appeals have not hesitated to disallow the deduction when there was any substantial doubt that the remainders would go to charity, either because of insufficiency of income, possibility of increase of beneficiaries, or absence of restriction on the use of the principal. But they have allowed the deduction in many cases such as ours. It has not been shown that the rule in the *Ithaca Trust Company* case has been subject to any abuse or that it requires any modification or limitation. The rule is an enlightened one. It permits the deduction of charitable remainders in cases where they are certain to all intents and purposes to vest in charity, as Congress intended. It does not countenance a deduction when the vesting is really at all speculative, or subject to the volition of the life tenant.

## Argument.

### 1. Exemptions favoring charity are not narrowly construed by this court.

The charitable deductions differ from other deductions in that they are not in favor of the taxpayer, but are in favor of charities serving the public welfare. Statutory provisions encouraging gifts to charity express an affirmative public policy of the first importance. This court has repeatedly stated that the provisions of the federal estate and income tax laws exempting gifts to charity from tax express the intention of Congress to encourage charitable gifts, that these provisions are liberalizations of the law begotten from motives of public policy, and that they are not to be construed narrowly. The construction of these provisions by this court has always been liberal.

*Edwards* v. *Slocum*, 264 U.S. 61.
*United States* v. *Provident Trust Company*, 291 U.S. 272.
*Helvering* v. *Bliss*, 293 U.S. 144.
*Old Colony Trust Company* v. *Commissioner*, 301 U.S. 379.

The deduction provisions of the estate tax law—sec. 303 (a)—are not couched in precisely the same words as those of the income tax law relating to trusts—sec. 162 (a)—because in the case of trusts it was necessary to make provision for the allowance of the deduction whether the income is paid over in the taxable year or accumulated for future distribution. The provisions, however, are *pari materia*. They should be construed similarly to effectuate their common purpose—*Helen G. Bonfils et al., Executors*, 40 B.T.A. 1079; affirmed 115 Fed. (2d) 788 (C.C.A. 10)—and it was so held in both the decisions below (R. 30, 66). Under both

Acts, then, the question is the same, namely, whether the gifts to charity made in Mr. Field's will are to be diminished by taxation because of the existence of any substantial doubt that those provisions will be carried out and that the whole residue of the estate will go, as he intended, for the benefit of charity. For light upon this question we turn to the opinion of the court in *Ithaca Trust Company* v. *United States*, 279 U.S. 151.

2. The Ithaca Trust Company case.

Edwin C. Stewart died on June 15, 1921, leaving a will wherein Ithaca Trust Company and his wife, Annie, were appointed executors and Ithaca Trust Company was appointed trustee. He gave to his wife the use for her life of the entire residuary estate, amounting to $347,244.51, with the added provision:

> "I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate which may be necessary to suitably maintain her in as much comfort as she now enjoys."

After her death the entire residue except for $35,000 was to be administered by the surviving fiduciary for the exclusive use of enumerated charitable institutions. The widow died less than six months after the death of the decedent. This was an action commenced in the Court of Claims to recover refund of estate tax assessed as a result of the refusal of the Commissioner to allow as a deduction the value of the residuary legacy.

The Court of Claims found:[3]

> "XIII. For many years prior to the death of said Edwin C. Stewart, he and his widow, Annie L. Stew-

[3] *Ithaca Trust Company* v. *United States*, 68 Ct. Cl. 686.

art, lived in Ithaca, New York, in a simple and unpretentious style, spending each year less than the income produced by the estate of the said testator; and the income from the estate of said testator was, at his death, and during the life of the widow, in excess of the sum necessary to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of said testator. After the payment of debts and the specific legacies, the estate produced an income in excess of the sum necessary, in the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator."

The widow was sixty-one years old at the date of death. The Court of Claims refused to allow the deduction and gave as its reasons:

"Without entering into a discussion of what limitations there were, if any, on expenditure by the life tenant 'to suitably maintain her in as much comfort as she now enjoys,' it is evident that the failure of investments, the diminution of the income, the high cost of living, and the changing ideas of what constitutes comfort might well absorb a good part, and possibly all, of the principal sum and leave no balance for charity, and that a contingency permeates the gifts to charity which may prevent any of them from ever going into possession and enjoyment. The gifts for charitable and religious purposes, therefore, did not take effect upon the death of the testator or upon the happening of an event which would certainly occur, and consequently, within the meaning of the statute, could not be deducted from the gross estate. In this view of the case, the plaintiff is not entitled to recover."

The petition for certiorari raised two issues: (1) Whether the bequests to charities were deductible; and (2) whether, if the bequests were deductible, the value of the life estate should be determined according to mortality tables as at the date of death or in the light of the widow's early death.

The Government did not oppose certiorari. In its brief the Government set forth fully authorities in support of the proposition that the value of the life estate should be determined at the date of death in accordance with mortality tables, but on the question of deductibility of the charitable remainders plainly indicated that it was in sympathy with the taxpayer's position.[4]

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[4] The following quotations are taken from the brief for the Government:

> "If the widow was given an unrestrained right to use the principal in her discretion, the amount of the bequests to charity would be entirely speculative. . . .
>
> "Whatever limit of judgment and discretion was allowed was vested not in the widow alone, but in the executrix and executor acting together. No large discretion was allowed. The use of only such amounts as might be 'necessary to suitably maintain her in as much comfort as she now enjoys' was permitted. That provision imposed a definite restraint on the use of the principal. . . .
>
> "Article 56 of Regulations 37, in force at the time this case arose, provides that 'Where by the terms of the bequest, devise or gift it is subject to be defeated by a subsequent act or event, no deduction will be allowed.' Literally construed and applied to its limit, the Regulation forbade the deduction in this case because there was the possibility that a substantial part, if not all, of the principal might be absorbed in maintaining the widow. The Court of Claims so held and the arguments in support of its view are fully set out in its opinion. We are compelled to admit that we are not in accord with the views expressed in its decision or the construction placed upon the Regulations by the Bureau of Internal Revenue.
>
> "The findings show that the widow was sixty-one years of age when her husband died. She and her husband had for a long time found the income of this estate more than sufficient for their joint support. Her style of living had become fixed,

In the opinion of this court, 279 U.S. 151, it is said (per Holmes, J.):

"The case presents two questions the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under section 403(a)(3), supra, in order to ascertain the estate tax, cannot be allowed. Humes v. United States, 276 U. S. 487, 494. This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the tes-

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and at her age was not likely to become changed. In any event, she was limited by the will to the degree of comfort and standard of living to which she had become accustomed. Only shrinkage in the values of the investments and diminution of earned income from such cause would have made it necessary to use any portion of the principal. . . . As a practical matter there are more uncertainties as to the real value of a bequest to charity in an individual case when determined by mortality tables than there was in this case as to the extent to which the power to use the principal might operate to diminish the charitable bequest. . . . Of course, possibilities of losses to the trust estate through misfortune or bad investments, exist in the case of any trust with a life estate and remainder, and the presence of such elements of uncertainty in this case does not distinguish it from the ordinary case of life estate and remainder, the value of which is determined by the use of mortality tables.

"The regulations on the subject have been in effect for some years, and no doubt have been applied to a considerable number of cases, and the fact that Congress has re-enacted the statute with regulations in force is a consideration which must be borne in mind before the position of the Bureau of Internal Revenue is rejected."

All Treasury Regulations relating to the subject were called to the attention of the court in the Attorney General's brief.

tator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."[5]

Under the rule so announced the beneficent policy of Congress in favor of charitable deductions did not have to be frustrated in the Stewart case merely because it was theoretically possible that under greatly changed conditions, wholly unforeseeable, invasion of principal could occur. And the Board of Tax Appeals found, under the rule, that such policy did not have to be frustrated in the instant case.

3. THE BOARD OF TAX APPEALS WAS AMPLY JUSTIFIED IN FINDING SUCH RESEMBLANCE TO THE ITHACA TRUST COMPANY CASE AS TO WARRANT APPLYING THE RULE THEREIN ANNOUNCED.

The *Ithaca Trust Company* case closely resembles this case in the size of the estate, the purpose and character of the provisions of the will, and the age and station and mode of life of the widow. The Stewart estate was $347,244.51, the Field estate $273,820.02; but Mrs. Field had over $100,000 of her own. The purpose of the provisions in question was identical, not to provide for any foreseeable possibility of failure of income (in neither case did any such possibility exist) but to be sure that the surviving spouse would be protected *no matter what happened, i.e.,* to insure against catastrophe. Such provisions are universally inserted in wills for just this purpose. The provisions vary in expression, but are of the same character. Mrs. Stewart was sixty-

[5] The opinion then decides that the value of the life estate must be estimated as at the date of death by the mortality tables.

one years old, Mrs. Field sixty-seven. In both cases the couples had found the income from the estate more than sufficient for their joint support. The style of living of the widows had become fixed, and at their ages was not likely to become changed.

In the *Field* case there was specific testimony that the mode of life which Mr. and Mrs. Field led was very comfortable and satisfactory to her, and cost about $6000 a year (R. 42, 43). The prospective income of the estate was well over $12,000 a year without regard to her own resources, which produced three or four thousand dollars more (Exhibit 1, R. 38, 47). That these resources were ample is very strikingly borne out by the subsequent experience. Mrs. Field has lived comfortably, travelled, indulged in modest luxuries, done whatever she wanted to do for her relatives well within the amounts available to her; in fact, she accumulated about $44,000. She has never asked for any of the principal of the estate and does not intend to (R. 46).

Chairman Murdock saw Mrs. Field and heard her testify. He experienced no difficulty in placing her in the New England scene or envisaging the comfortable and benevolent manner of life she had lived and would continue to live under the compulsion of habit and of principle. He concluded that an ascertainable standard had been established, that the income of the estate at the death of the testator was more than sufficient to maintain the widow as required, and there was no uncertainty as to future sufficiency appreciably greater than the general uncertainty that attends human affairs (R. 30). He said: "This may be a borderline case, but the possibility of corpus being invaded is sufficiently remote to justify the deductions claimed" (R. 31).

For what error or under what principles of law should that decision be reversed?

4. THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE DECISION OF THE BOARD OF TAX APPEALS.

The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals because it considered its own decision in *Gammons* v. *Hassett*, 121 Fed. (2d) 229 (certiorari denied, 314 U.S. 673), to be controlling, rather than the decision of this court in the *Ithaca Trust Company* case. Thus it said:

> "The decision in the instant case depends upon the proper interpretation of the language used in the testamentary trust, that is, whether or not there is present *a possibility of invading corpus of the trust in the sense that that phrase was used in Gammons* v. *Hassett*." (Italics ours.)

The decision in the *Gammons* case was right, but it was an entirely different kind of case. In the *Gammons* case the residue was given to trustees upon the limitation:

> "The income thereof . . . and so much of the principal thereof as my said wife may at any time and from time to time need or desire, to be paid to my said wife during her life."

At this point we call attention to the Massachusetts case of *Dana* v. *Dana*, 185 Mass. 156, in which the residue was given to the wife with power

> "to sell and dispose of any or all of it at her pleasure and discretion, whenever she may think it necessary or expedient for her own comfort and happiness, without accountability to any person whomsoever."

The reversion and residue, "if any," were bequeathed to the testator's relatives. It was held that the wife took a

life estate with power of disposal in fee, and that the relatives took vested remainders, dependent upon the contingency that the exercise by the widow of the power conferred might determine their estate. Of this power it was said by Braley, J.:

> "He gave to his wife during her lifetime as absolute and ample a power to dispose of the estate devised as would be possessed by an owner in fee."

All that was necessary to the decision of the *Gammons* case was to point out that under the *Dana* case the widow's right to use the principal was unrestrained; that invasion of corpus was wholly in the widow's discretion, and that such a case is different in kind from cases of gifts where limited power of invasion is given to independent trustees.[6]

But *Dana* v. *Dana* is not referred to in the *Gammons* opinion. It was not cited in the Government's brief. If it had been called to the court's attention, the Circuit Court of Appeals might not have been greatly troubled by the *Ithaca Trust Company* case. It was troubled by that case. In the opinion of the court by Judge Mahoney, it is said:

> "If we were to extend the principle of *Ithaca Trust Company* v. *United States*—to cover this case, then the taxing authorities would be involved in litigation with respect to the likelihood of the use of the power in every case in which there was a gift to charity subject to a power of appointment away from the charity or a power to invade principal other than for mere needs."

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[6] This was recognized in the *Ithaca Trust Company* case, in the opinion, and also in the brief of the Attorney General (*supra*, pp. 15, 16).

Judge Magruder in his concurring opinion said:

> "In my opinion the case at bar could be decided in favor of the taxpayer on a perfectly logical application —or perhaps extension—of the principle laid down in *Ithaca Trust Co. v. United States*. . . . The *Ithaca Trust case* must be considered as going to the very verge of the law, and in the absence of further guidance from the Supreme Court we ought not to extend the doctrine of that case, however logical and appealing the extension might be under the particular facts."

Such is the background against which the instant case was tried in the Circuit Court of Appeals. We of course disclaim any contention that the rule in the *Ithaca Trust Company* case is applicable to a case when the widow has powers tantamount to ownership in fee and the gift over is subject to her whim.

The opinion below indicates that the Circuit Court of Appeals still does not appreciate that the case of power of disposition in the life tenant is different in kind from the case of discretion lodged in a trustee under provisions imposing a definite restraint on the use of principal; that in the first case the possibility of invasion is incapable of evaluation; that in the second case it is not. But the court does recognize that

> "there exist certain distinctions in the case before us and *Gammons* v. *Hassett*."

However, the court concludes that the distinction from *Gammons* v. *Hassett* is illusory, while the distinction from the *Ithaca Trust Company* case is fundamental. All this is made to turn upon the use by Mr. Field of the additional words "and or happiness" and his injunction to the trustee to exercise its discretion with liberality to Mrs. Field.

Happiness, says the court, is essentially a subjective matter and must be left to the honest determination of the widow. If the widow should desire to provide for her relatives, it would be the duty of the trustee to distribute principal in gratification of the desire. Thus discretion is wrested from the trustees and conferred upon Mrs. Field and the invasion of the principal is made to turn upon the volition of Mrs. Field and not of the trustees, and we are no longer concerned with a case of a trust with limited powers of invasion in the discretion of the trustees, such as the *Ithaca Trust Company* case, but rather with a case of practically unlimited power of disposition in the life tenant, like the *Gammons* case..

For such construction, no authority is cited by the court, and none is known to us. But it seems to us that it cannot conceivably be considered that Mrs. Field has any such unrestricted right, or that the trustee has. The general canon for the construction of a will is to determine the intention of the testator from the words used, having regard to the general scheme of the will, the connection in which particular words are used, and the circumstances surrounding the testator. We would suppose with considerable confidence that any court would construe the expressions used by Mr. Field, "and/or happiness" and the injunction to exercise the discretion with liberality, employed as they were in connection with the grant of discretion to the trustees for maintenance of the widow, as rather somewhat enlarging the scope of the maintenance provisions than as changing those provisions into anything approaching a power of disposition in the life tenant.[7] Had the testator desired to provide for the gratification of Mrs. Field's whims or to make the invasion of principal subject to her volition, it would have been easy to have done so.

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[7] See cases discussed *infra*, pp. 23-27.

The language used by Mr. Field was used for the same purpose as that used by Mr. Stewart. In both cases it was a mere protective measure. It was used with reference to a standard of living long enjoyed and which was "very comfortable and satisfactory" to Mrs. Field (R. 43). The direction for exercise of liberality was with reference to that ascertainable standard. Unquestionably, the additional words used by Mr. Field are not to be ignored, and they do somewhat broaden and liberalize the discretion compared with that given in the *Ithaca Trust Company* case. Quite possibly this justified the Board of Tax Appeals in speaking of this case as a borderline case, but it did not oust the Board from jurisdiction to determine on which side of the border the case lay. It did not change the trust from one of the *Ithaca Trust Company* type to one of the *Gammons* type. Remaining a case of the *Ithaca Trust Company* type, the deduction is not to be disallowed because it is *possible* that invasion can occur, but only if that possibility has some degree of *probability*. The Board of Tax Appeals found, and was entitled to find, that in the circumstances the wording used by Mr. Field did not create any material probability of the gifts' not taking effect.

From the opinion below it clearly appears that the court does not quarrel with this finding. It seeks to escape the *Ithaca Trust Company* rule by an extraordinarily wide construction of the power which Mr. Field conferred upon his trustee, thus rendering the finding of the Board immaterial and permitting the court to declare that a possibility of invasion is enough to prevent the deduction. The decision so arrived at is, of course, exactly contrary to that in the *Ithaca Trust Company* case. The decision below is completely at variance with the decisions in the other circuits.

5. OTHER CIRCUIT COURTS OF APPEALS HAVE FOLLOWED THE ITHACA TRUST COMPANY CASE IN CASES OF TRUSTS FOR CHARITY WITH LIMITED POWERS OF INVASION WHICH RESEMBLE THE FIELD TRUST.

In *First National Bank of Birmingham* v. *Snead*, 24 Fed. (2d) 186 (C.C.A. 5, 1928), an estate tax case, the trustees were empowered to pay to the wife sums out of principal

> "if at any time in the opinion of said trustees the net income from said trust estate shall not be sufficient for the proper support and comfort of my said wife . . ."

The Circuit Court of Appeals pointed out that the trustees were not empowered arbitrarily to invade the corpus and that the exercise of their discretion was subject to judicial revision and control, and that while it was barely possible, it was wholly improbable that any sum would be needed. It held that the deductions were allowable, overruling the district court which had sustained the Government's demurrer based on asserted contingency of the charitable donations. This case was decided before the decision of the Supreme Court in the *Ithaca Trust Company* case.

In *Hartford-Connecticut Trust Co.* v. *Eaton*, 36 Fed. (2d) 710 (C.C.A. 2, 1929), the trustee was empowered

> "to pay over to or for the benefit of my said wife any part of the principal of the trust fund which it may deem necessary or advisable for her comfortable maintenance and support."

The widow lived in a modest way, considering the income of her husband's estate and her own resources; and her character, taste, and standard of living were such that there was at no time any reasonable possibility that the trustee would deem it necessary to use any of the principal. It was held,

affirming the district court, that the case was ruled by the *Ithaca Trust Company* case, notwithstanding that the phrase "comfortable maintenance and support" was broader than that used in the *Ithaca Trust Company* case.[8] The phrase, by construction, was intended to secure to the beneficiary the kind of living which she had enjoyed. The court laid emphasis upon the fact that the power was not granted to the widow but to the trustee, who was limited in the exercise of the discretion.

In *Lucas* v. *Mercantile Trust Co.*, 43 Fed. (2d) 39 (C.C.A. 8, 1930), an estate tax case, the trustee was directed to pay to the wife the income or *if need be* such part of the corpus of the trust estate as might be necessary for the comfort, maintenance, and support of the wife. The will also provided

> "A request in writing to my trustee made by my wife, stating that the sum requested by her is needed for her comfort, maintenance, and support, shall be authority to my trustee to pay unto her any sum so requested out of the corpus; or in the event of her incapacity, then my trustee may, in its discretion, use so much of the corpus as may be necessary for her comfort, maintenance, and support."

The Government contended that the widow was given the unlimited right to invade the corpus and absorb any part, or all, thereof for her comfort, support, and maintenance, and therefore the value of the charitable bequests could not be ascertained. The Circuit Court of Appeals, affirming the Board of Tax Appeals, held that the power to determine where there was *need* was the trustee's and that it was not left in the discretion of the widow and that the

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[8] ". . . necessary to suitably maintain her in as much comfort as she now enjoys."

deduction was allowable under the rule in the *Ithaca Trust Company* case. The court pointed out that if the trustee, upon the mere written notice from the widow that she needed corpus for her comfort, maintenance, and support, should turn it over to her, it would be guilty of dereliction of duty.

In *Commissioner* v. *F. G. Bonfils Trust*, 115 Fed. (2d) 788 (C.C.A. 10, 1940), an income tax case, an estate having ordinary income of over $160,000 was left to charities, subject to the payment of annuities, including an annuity to the widow, amounting to $110,200 per annum. The will provided that in case the net income was not sufficient to pay all of the annuities in full, such additional amounts as might be required from time to time should be paid out of the corpus of the trust estate. The court held that the *Ithaca Trust Company* case applied and that the case was concluded by the finding of the Board of Tax Appeals.[9] The *Bonfils* case was followed by the Circuit Court of Appeals for the Sixth Circuit in *Commissioner* v. *Upjohn's Estate*, 124 Fed. (2d) 73, a very similar case.

*Commissioner* v. *Bank of America, N.A., Ex'r.*, 133 Fed. (2d) 753 (C.C.A. 9), is an estate tax case, decided Feb-

[9] *F. G. Bonfils Trust*, 40 B.T.A. 1085. See also *Helen G. Bonfils et al., Executors*, 40 B.T.A. 1079, the companion case, which contains the reasoning of the Board, which we submit is excellent: *viz.* (at p. 1083): "In our opinion the basic principle underlying the decision in *Ithaca Trust Company* v. *United States*, 299 U.S. 151, suggests the proper approach to the interpretation of the phrase 'permanently set aside . . .' Though a deduction is a matter of legislative grace and the proof must bring it clearly within the statutory provisions, it is a matter not only of judicial inclination, but also the legislative policy to encourage gifts and transfers to charitable institutions . . . Thus, whether or not the income of the estate would be 'permanently set aside' calls for the application of the test of reasoning, not the blind adherence to the definition of words. The question of the reasonable probability that any part of the capital gains would be required to pay annuities is a factual one."

ruary 25, 1943, after the decision below had been handed down. In this case the testator declared that his only near kin was a sister and that her welfare was uppermost in his mind. He bequeathed her his home and household property. The residue of the estate was bequeathed to the respondent bank in trust to pay the sister $250 per month

> ". . . and in case she should, by reason of *accident, illness, or other unusual circumstances* so require, such additional sum or sums as in the judgment of said trustee may be necessary and reasonable under the existing circumstances."

The remainder went to charity. The sister was seventy-nine years old, and her eyesight was impaired. She had a home and income-producing property from which she derived an income of approximately $900. Her living expenses were approximately $1,450. The income of the estate was approximately $5,000. The Commissioner argued,[10] that where the bequest was subject to an intervening life estate, the existence of the legal power to invade the corpus, or the mere possibility of invasion, was sufficient to defeat the deduction. The Board of Tax Appeals, in a Memorandum Opinion, Dec. 12183-A, was of the opinion that on the facts of the case any probability of the trustees' delving into corpus or even into surplus income was so inconsiderable as to render the value of the charitable bequest capable of a definite ascertainment. The Circuit Court of Appeals in affirming the decision of the Board on authority of the *Ithaca Trust Company* case said that it did not understand that this court had announced such a hard and fast rule as the Commissioner contended

[10] Notwithstanding that in the *Ithaca Trust Company* case the precisely similar reasoning of the Court of Claims had been overruled by this court.

for, although it acknowledged that the views advanced appeared to have found acceptance in the decisions of the Circuit Court of Appeals for the First Circuit in the *Gammons* and the *Merchants National Bank* cases. The court pointed out that nothing was left in the sister's discretion and that the discretion of the trustee to meet the designated sum was confined to what was reasonably necessary. The court said:

> "Naturally; cases arising under this statute present gradations of probability; and we do not wish to be understood as suggesting that charitable bequests in the remainder are deductible where there is a real likelihood of an undetermined part of the corpus being taken for the benefit of the life tenant. It is the duty of the Commissioner in administering this statute to give effect to the beneficent purpose of Congress; and we believe a proper performance of the duty requires that attention be paid to the actualities of each case. The administrative difficulties in the way of doing that are not insurmountable. On the other hand, blind adherence to arbitrary standards must result, in many instances, in the needless frustration of the legislative policy."

We submit that the decision below is in conflict with all of the foregoing decisions.

6. THE RULE IN THE ITHACA TRUST COMPANY CASE IS AN ENLIGHTENED ONE. IT HAS WORKED WELL. THE DECISION BELOW IS NOT CALLED FOR BY ANY PRACTICAL CONSIDERATIONS. IT IS A STEP BACKWARD. IT SHOULD BE REVERSED.

The rule in the *Ithaca Trust Company* case is, as we understand it, that in cases where the discretion is vested

in a trustee, to be exercised in accordance with some ascertainable standard, the deduction is to be allowed where there is no material uncertainty that the charity will take. It is an enlightened rule. To the problem of protecting the revenues on the one hand and giving desirable assistance to charity on the other it offers a practical solution. Is there indeed any doubt? In the light of the purpose which the testator intended to express, the age and character and mode of life of the life tenant, the size of the estate, other resources available, and any and all other material considerations, is there, indeed, any uncertainty appreciably greater than the general uncertainty that attends human affairs? This is largely a factual question. Under the rule of the *Ithaca Trust Company* case this question can be determined in the light of all the circumstances by the tribunal that finds the facts and sees and hears the witnesses. If it finds that in fact there is no material uncertainty, and the finding is supported by evidence, then the deduction is allowed as Congress intended it to be. Under the rule weight is given to the legislative policies involved. Where the possibility of impairment of revenue is sufficiently remote, the policy of encouraging charity can be carried into effect.

Reported cases show that the rule has worked well. There is no indication that it has been the subject of abuse. The courts and the Board of Tax Appeals have been quick to disallow the deduction where there was any substantial doubt that the remainders would go to charity, either because of insufficiency of income,[11] possibility of increase of beneficiaries,[12] or absence of restriction on the use of prin-

[11] *John & Pauline Tonningsen Trust*, 43 B.T.A. 37; affirmed (C.C.A. 9), 126 Fed. (2d) 48. *Springfield Safe Deposit & Trust Co. et al., Executors*, 43 Fed. Supp. 401.

[12] *Boston Safe Deposit & Trust Company v. Commissioner*, 66 Fed. (2d) 179 (C.C.A. 1). *Charles W. Jaynes et al., Trustees*, 29 B.T.A. 259.

cipal.[13] On the other hand, they have allowed the deduction in appropriate cases, many of which we have cited [14]. In no case where the deduction has been allowed does it appear at all probable that any invasion of corpus will ever be called for. And in the case at bar we do not believe that anybody, (including the judges of the First Circuit Court of Appeals,[15]) feels any doubt that a widow of the character and age of Mrs. Field will in all human probability live out her life in comfort and happiness (so far as money can conduce thereto) well within the income of over a quarter of a million dollars, without reference to her own estate of over $100,000.

Under the decision below all of the foregoing considerations are swept aside and all is made to depend upon the particular expression employed by the testator. If he goes beyond the words used in the *Ithaca Trust Company* case, consideration of extrinsic evidence or intrinsic probability is excluded and the deduction denied. If possible to conjecture any possibility, however remote or unlikely, under which corpus could be invaded, the deduction is de-

[13] *Gammons* v. *Hassett*, 36 Fed. Supp. 529. *Knoernschild* v. *Commissioner*, 97 Fed. (2d) 213 (C.C.A. 7). *Helvering* v. *Union Trust Co. of D.C., Executor*, 125 Fed. (2d) 401 (C.C.A. 4); certiorari denied, 62 S. Ct. 1292. *Mary B. Pomerene, Executrix*, T.C. Memo. Op., June 24, 1943, C.C.H. Estate Tax Service, ¶7076. *Norris et al., Executors*, v. *Commissioners* (C.C.A. 7), April 5, 1943; C.C.H. Estate Tax Service, ¶10,031; certiorari applied for. *First Trust Co. of St. Paul* v. *Reynolds* (C.C.A. 8), August 13, 1943; C.C.H. Estate Tax Service, ¶10,058.

[14] See also *Sanderson, Executor*, 18 B.T.A. 221; *Boston Safe Deposit & Trust Company*, 21 B.T.A. 394. *Michigan Trust Company*, 27 B.T.A. 556. *Estate of Mary A. Hume*, T.C. Memo. Op., May 20, 1943; C.C.H. Estate Tax Service ¶7060.

[15] Per Mahoney, J. (R. 67): "The argument that under the facts in this case there is little likelihood that Mrs. Field will want to invade the corpus of the trust is similar to the argument advanced in *Gammons* v. *Hassett*, supra. We refused in that case to consider extrinsic evidence of a most persuasive nature."

nied. No showing has been made calling for so severe a construction.

We submit that better results can be obtained by developing the rule in the *Ithaca Trust Company* case (as it is being developed) by a process of judicial inclusion and exclusion than by substituting, as the Circuit Court of Appeals has done, a classification of words and expressions, and making the result depend upon the ones employed. Wills are frequently drawn by persons unskilled in the law, or in the niceties of tax law. It would be unfortunate if the taxability of charitable remainders should depend upon the precise form of words used, unless, indeed, the variation introduces a material uncertainty. Preoccupation with words of art to the neglect of substance is characteristic of primitive rather than enlightened jurisprudence.[16] The decision below marks a retreat from an objective achieved by the opinion in the *Ithaca Trust Company* case, and should be reversed.

Respectfully submitted,

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[16] *United States* v. *Provident Trust Company*, 291 U.S. 272. *City Bank Farmers' Trust Company* v. *United States*, 74 Fed. (2d) 692 (C.C.A. 2). These cases involved the deductibility of gifts over to charity on failure of issue to women who were found in fact unable to bear children. From the latter case, per A. N. Hand, Cir. J.: "We ought not to make an exemption in aid of charitable gifts depend on considerations that are wholly unreal and illusory."